

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES (COPP)

JAYSON O'NEILL v. JUDGE DAN WILSON (Montana Supreme Court, Justice No. 3 candidate)	COPP-2024-CFP-022 FINDING OF FACTS SUFFICIENT TO SUPPORT VIOLATIONS
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COMPLAINT

On May 22, 2024, Jayson O'Neill of Helena, MT, filed a campaign finance and practices complaint against Montana Supreme Court candidate and Flathead County District Court Judge, Dan Wilson. The complaint alleged that candidate Wilson failed to timely and appropriately disclose contributions received or expenditures made by his campaign to attend a Lincoln-Reagan Day Dinner held by the Broadwater County Republicans, or alternatively, that Judge Wilson did not pay for the dinner and therefore accepted a prohibited contribution from a political party committee.

The submitted complaint conforms to the requirements of Admin. R. Mont. 44.11.106 and alleges violations of statutes which fall under my jurisdiction as Commissioner of Political Practices. Therefore, I accepted it as filed, and in accordance with COPP procedures requested a response from Judge Wilson. Judge Wilson filed a timely response on May 31, 2024. The complaint and response are posted on COPP's website, politicalpractices.gov.

ISSUES

Prohibitions on campaign contributions made to judicial candidates by political party committees, MCA § 13-35-231; reporting of contributions received and expenditures made by candidates, MCA § 13-35-229.

BACKGROUND

While Judge Wilson's matter here is not unique or worthy of special notice, the timing of this decision as we enter the next reporting cycle for the 2024 election

provides an opportunity to discuss enforcement laws with respect to disclosure requirements.¹ Candidate Wilson's reports also provide an opportunity to address how candidates and committees report debts: and more specifically when that needs to occur. Again, candidate Wilson is worthy of no special notice in this regard. His situation is not unique. This just presents an opportunity to illustrate the requirements of the disclosure law in advance of the 2024 General Election.

a. *Disclosure, generally.*

Disclosure, including timely disclosure, advances an important and well-recognized government interest by providing information to the voting public about those vying for their attention. *Ream v. Bankhead*, COPP-1996-CFP-09/10/1999 at 7. Government agencies, like COPP, serve as a point where the public has access to that information in a uniform and understandable way. *Ellsworth v. Bullock*, COPP-2016-CFP-041 at 6. Legislatively enacted statutes have already decided what transactions require disclosure and when they must be reported. MCA Title 13, chapter 37, part 2. Disclosure ensures that voters have the facts necessary to evaluate messages competing for their attention. It also provides general transparency to the public and those acting on their behalf. Lastly, it provides information to government agencies in other areas of enforcement. Taken together, these functions promote confidence and integrity in the election process. See generally, *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010).

Montana's reporting requirements have already been upheld by federal courts as simple and straightforward, which means our requirements withstand constitutional scrutiny and are not overly burdensome on candidates or political committees. *National Association for Gun Rights (NAGR), Inc. v. Mangan*, 933 F.3d 1102 (9th Cir. 2019). While most laws that affect First Amendment rights are subject to strict scrutiny - a compelling interest that is narrowly applied - laws that merely require disclosure can meet a lower standard of intermediate or exacting

¹ This discussion is also included in other recent decisions, including *MTGOP v. Mullen*, COPP-2024-CFP-030, and *MTGOP v. Alke*, COPP-2023-CFP-018.

scrutiny. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 367, 130 S. Ct. 876, 914 (2010). This means the purpose of the law serves a substantially important interest and the law is written to achieve that interest. *Id.* Disclosure laws may burden candidates and political committees, but they do not impose a ceiling on campaign activities or restrict speech. *Citizens United v. FEC*, 130 S. Ct., 914. Consequently, disclosure laws that withstand exacting scrutiny are generally deemed constitutional.

This general rule is not absolute. In limited instances, even disclosure laws that impact First Amendment rights of association face strict scrutiny analysis. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 141 S. Ct. 2373 (2021). Broad definitions with sweeping implications, applied in a subjective manner, as well as vague laws that fail to provide fair notice also implicate First Amendment rights requiring more stringent scrutiny. See, generally, *Butcher v. Knudsen*, 38 F.4th 1163 (9th Cir. 2022).

As Montana Supreme Court Justice Baker indicated in her *WTP v. Attorney General* dissent, following *Citizens United*, Montana “should focus on preserving disclosure requirements....in order to protect the overriding interest in preventing corruption.” *WTP v. Attorney General*, 363 Mont. 220, 241, 271 P.3d 1, 2011 MT 328, ¶ 50. Justice Baker notes from the court record that “disclosure requirements are the means by which to address the State’s compelling interest in preserving the integrity of the election process” and that “disclosure requirements are among the “constitutional tools” available to the states in the wake of *Citizens United*.” *Id.* In addition, Justice Baker relies on *HLW v. Brumsickle* for the proposition that “[t]he value of disclosure in preventing corruption cannot be understated. *Id.* at 59.

Disclosure laws establish a reporting system that includes laws, rules, and reporting deadlines, which are imposed upon all candidates and political committees. The principal function is always to provide information voters may deem important when deciding how to cast their vote. Consequently, it is critical that disclosure occurs before the election rather than after an election. The purpose of disclosure is only achieved if reports are timely filed with COPP.

Accurate reporting is just as important. Candidates and committees should report all activity meant to influence the results of our elections. Critical terms, such as contributions and expenditures, are specifically defined to include all campaign related activities. MCA § 13-1-101(9), (21). Thus, timely reporting plus accurate reporting equals full disclosure. MCA § § 13-37-201, 226, 228, 229.

COPP establishes a uniform system of disclosure and reporting applicable to all candidates and political committees. MCA Title 13, chapter 37, part 2. We employ compliance specialists to assist individuals filing these reports. When complaints are filed alleging violations, we investigate those complaints and apply substantive facts to the established law. MCA § 13-37-111. If prosecution is justified COPP can pursue penalties for intentional and negligent violations. MCA § 13-37-128. These enforcement decisions are posted, and the commissioner reviews prior similar decisions to achieve stability as to how these laws are interpreted. *Welch Advisory*, COPP-2014-AO-009. Only courts, rather than administrative agencies, have jurisdiction to decide constitutional issues, but agencies are required to interpret laws in a manner that recognizes constitutional issues, so the law is applied in a constitutional way. See *Id.*, 7-8 citing, *Brisendine v. Dep't of Commerce*, 253 Mont. 361, 366, 833 P.2d 1019, 1021-22 (1992), and *City of Great Falls v. Morris*, 332 Mont. 85, 134 P.3d 692, 2006 MT 93 ¶ 19.

b. *Applying law with respect to circumstances.*

If the public, candidates, political committees, or journalists reading COPP decisions notice what appears to be a more rigid application of disclosure laws than other laws, it is predominantly due to what courts have allowed and permit when we apply disclosure laws versus other laws under the agency's authority. When we reach decisions, we remain mindful of what standards the courts apply.

These laws must be equally and objectively applied to all candidates and political committees so I will set forth various factors later in this decision. This approach was taken by the commissioner in *Landsgaard v. Peterson and Wilks* with respect to how frivolous complaints are determined and handled. COPP-2014-CFP-008. It is appropriate that I do something similar here regarding the importance of

accurate and timely disclosure and what factors determine whether a matter justifies prosecution.

With this background provided, I will address the specific disclosure related complaint pertaining to Judge Wilson, followed by a discussion and application of the factors I apply when determining if prosecution is justified.

DISCUSSION

Montana election law requires candidates to file as such with COPP and to file periodic finance reports throughout their campaign in accordance with a statutorily mandated reporting calendar. MCA §§ 13-37-201, 226. Candidates are required to report all contributions received and expenditures made benefitting their campaign, including personal expenditures which are reported as either in-kind contributions or loans. ARM 44.11.403.

Judge Dan Wilson, of Kalispell, MT, filed a C-1 Statement of Candidate with COPP on June 13, 2023, as a candidate seeking election to the Montana Supreme Court. As noted in the complaint, the Broadwater County Republican Central Committee hosted a Lincoln-Reagan Day dinner in Townsend, MT, on April 20, 2024. The cost to attend this event was \$40.00. Judge Wilson's C-5 periodic campaign finance report for April 16 through May 15, 2024, did not clearly report any payments for the Lincoln-Reagan Day dinner or expenses for travel to Townsend for the event. (COPP Records)

Judge Wilson's response states that expenses for the dinner were included on the report as part of a lump sum of expenditures that Judge Wilson made with personal funds during that time. He additionally states that his travel expenses were inadvertently not reported.

Following receipt of this complaint, Judge Wilson's campaign amended the related C-5 to directly report expenses for both a dinner ticket and travel to Townsend to attend the event.

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I. Prohibition on campaign contributions by political party committees

Montana election law unambiguously provides that a political party committee may not provide campaign contributions to judicial candidates. MCA § 13-35-231 specifically states: “A political party may not contribute to a judicial candidate.” Judge Wilson, as a candidate for the Justice No. 3 on the Montana Supreme Court, qualifies as a judicial candidate subject to the statute. Additionally, the Broadwater County Republican Central Committee, hosts of the April 20, 2024, Lincoln-Reagan Day dinner, qualifies as a political party under the definition provided by MCA §§ 13-1-101(35), (36). Therefore, Judge Wilson is prohibited from accepting campaign contributions from the Broadwater County Republican Central Committee.

In this case, Judge Wilson’s attendance at the April 20, 2024, Lincoln-Reagan Day dinner does not constitute a contribution provided by the Broadwater County Republican Central Committee. As explained in his response and later clarified in discussion with COPP staff, Judge Wilson used personal funds to pay the listed price of \$40 to attend the event. Having paid the same price as all attendees and having received no special accommodations, Judge Wilson did not receive a reportable campaign contribution.

While judicial candidates are prohibited from accepting contributions from political parties, Montana election law does not prohibit them from utilizing campaign funds to travel to, and attend events, hosted by a political party committee or organization. Consequently, COPP finds nothing improper in a candidate utilizing campaign or personal funds to attend an event hosted and organized by a political party committee, such as the April 20, 2024, Lincoln-Reagan Day dinner attended by Judge Wilson.

The allegation that Judge Wilson may have accepted a prohibited political party contribution is therefore dismissed in full. However, as outlined below, these expenses must be properly reported as either expenditures or contributions.

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II. Timely and accurate reporting of contributions and expenditures

Montana election law requires candidates for public office to disclose all campaign contributions received and expenditures made (including debts or other obligations) to support their candidacy. MCA § 13-37-229. Montana has specifically defined contribution to include:

The purchase of tickets or admissions to, or advertisements in journals or programs for testimonial or fund raising events, including, but not limited to dinners, luncheons, cocktail parties, and rallies held to support or oppose a candidate, issue, or political committee; (c) a candidate's own money used on behalf of his or her candidacy. . .” ARM 44.11.101(1)(b).

Here, Judge Wilson’s campaign failed to properly report campaign expenses for both the dinner ticket and travel to the Lincoln-Reagan Day dinner, as well as similar expenses during the same time period.

Dinner

As explained by Judge Wilson, the \$40.00 paid by his campaign for admittance to the dinner was included on the original version of the report. However, Mr. Wilson and members of his campaign team assisting him with filing the report, failed to itemize each individual expense, instead including it as part of a singularly reported \$167.10 in “cash expenditures.” (Response, 1.) In *Eaton v. Gross* the commissioner held, “generic expenditure descriptions are more akin to a list or a category than a description and do not provide the “purpose, quantity, subject matter” of the expense which are the details required to be reported.” COPP-2018-CFP-021, at 4. A broad categorization such as “cash expenditures.” provides no information regarding purpose, quantity, or subject matter.

In *Montana Freedom Caucus v. Representative Zephyr*, the commissioner determined that finance reports must “[p]rovide descriptions that provide an ascertainable explanation of what the spending was actually for. . .” COPP-2023-CFP-010, at 18. Reporting a lump sum of cash expenditures without itemization provides even less information than a list or category. An interested party is unable to ascertain any information as to “what the spending was actually for.” *Id.* Upon

notification of this issue, Judge Wilson’s campaign immediately amended the applicable C-5 report to properly itemize these expenses. However, this expenditure - the \$40 dinner ticket – was incorrectly reported as a debt. This issue was also resolved through consultation with COPP staff described later in this decision.

Travel

As to travel expenses, Judge Wilson’s C-5 periodic campaign finance report for the applicable period (April 16 through May 14, 2024) did not disclose any expenditures made or debts owed related to any travel to campaign events. Shortly after his receipt of this complaint, Judge Wilson filed an amended version of this report, disclosing a debt owed in the amount of \$246.56 for travel from his home in Kalispell to Townsend and back. It also disclosed an additional four debts owed, totaling \$973.51 for travel to various campaign events in Missoula, St. Regis, Great Falls, and Helena. In total, Judge Wilson’s campaign failed to disclose five expenditures for campaign travel costs totaling \$1,220.07.

III. Proper reporting of personal expenditures by a candidate

While Judge Wilson’s campaign promptly attempted to resolve their reporting errors, the first amended report wrongly reported these expenses as debts owed when correct reporting would list them as loans from the candidate to the campaign. ARM 44.11.403(2). The COPP attorney spoke with Judge Wilson on August 7, 2024, to clarify the expenses related to the Lincoln-Reagan Day dinner and related travel. Judge Wilson stated that he had paid these expenses out of his personal funds, and that he intended to be reimbursed by the campaign “if there is enough money” at the end of his campaign. Subsequently, the COPP attorney and a compliance specialist again spoke with the campaign treasurer and deputy treasurer for Judge Wilson’s campaign on August 8, 2024, regarding properly reporting expenses which are initially covered by a candidate such as Judge Wilson. The May 17, 2024, C-5 report was immediately and properly amended to reflect this discussion.

The information relayed to the campaign is applicable anytime a candidate pays for campaign expenses out of personal funds and is outlined as follows:

While the candidate is in-fact making an expenditure when purchasing something for the campaign, because the funds belong to the candidate rather than the campaign, this is not an expenditure of the campaign. Rather, this is either an in-kind contribution or a loan from the candidate to the campaign. MCA § 13-1-101(9). ARM 44.11.403(2) explains: “A candidate who makes personal expenditures benefitting his or her campaign, shall also report and disclose the expenditures as in-kind contributions or loans to the campaign, see ARM 44.11.501.” If/when the campaign reimburses the candidate, the campaign will then report this as an expenditure and as a repaid loan. ARM 44.11.501(b)(i).

ENFORCEMENT

The duty of the commissioner to investigate alleged violations of election law is statutorily mandated. MCA § 13-37-111. Upon a determination that sufficient evidence of election violations exists, the commissioner next determines if there are circumstances or explanations that may affect whether prosecution is justified. *Rose v. Glines*, COPP-2022-CFP-030. “The determination of whether a prosecution is justified must take into account the law and the particular factual circumstances of each case, and the prosecutor can decide not to prosecute when they in good faith believe that a prosecution is not in the best interest of the state.” *Zephyr*, COPP-2023-CFP-010, at 26.

In *Montana Freedom Caucus v. Zephyr*, I discussed whether the referral to a county attorney must occur in a perfunctory manner whenever sufficient evidence of a violation is found, or whether I may use the discretion provided to me in MCA § 13-37-124(1) to first determine if prosecution of the matter is justified. I find the latter approach which considers not only whether sufficient evidence exists but whether prosecution is in the best interest of the state, to be the more thorough and reasoned approach.

While I feel this approach best serves the interest of Montanans, no clear criteria for determining if prosecution is justified has been clearly articulated by past commissioners. Enforcement requires objective standards. The following outlines the four primary factors I will consider in determining when prosecution is

justified.²

As addressed in *Butcher v. Knudsen*, I must take into account vagueness with respect to the activity and remain mindful of other purposes a speaker might be engaged in rather than just rigidly applying definitions without regard to circumstances. Thus, being mindful of *Butcher* and the other cases, together with past COPP decisions, the following factors will apply:

1. *Proximity to an election*

First, the purpose of campaign finance reporting is to provide voters with accurate and relevant information that will inform their decisions at the ballot box. Therefore, inaccurate and late reports that occur in close proximity to an election, thus depriving voters of information they are entitled to before voting, will be considered egregious violations.

2. *Pattern of behavior*

Next, prosecution is nearly always justified when a pattern of noncompliance exists. Habitual late or inaccurate reporting increases the likelihood of errors and shows a lack of commitment to transparency and the interests of Montana voters. Therefore, decisions involving repeat offenders, candidates or committees with multiple late reports within one election cycle, and those that are currently the subject of an order of noncompliance, will nearly always be referred for prosecution.

3. *The size of misreported contributions or expenditures*

The size of contributions or expenditures that go unreported increases the seriousness of the violation. Therefore, when violations involve amounts that cannot be excused as de minimis, or are sizeable relative to contribution limits, these matters are also likely to be referred.

4. *Responsiveness*

Part of the established process of handling complaints involves requesting a response from the alleged violator. When a response is received, I may consider any

² This discussion is also included in other recent decisions, including *MTGOP v. Alke*, COPP-2023-CFP-018, and *O'Neill v. Wilson*, COPP-2024-CFP-022.

mitigating factors presented in determining whether prosecution is justified. I may also consider whether the alleged violator makes prompt corrections when errors are realized. This includes reference to when a complaint is filed and whether the alleged violator was actively engaged with a COPP compliance specialist or if the candidate was ignored the provided notices.

I intend to apply the four factors outlined above whenever I consider if prosecution is justified. Other mitigating factors that I may consider include whether multiple violations exist rather than an isolated occurrence and whether pursuing a particular violation is an economic use of taxpayer resources.

If, after applying the above factors, I find sufficient evidence to justify a prosecution, I am then mandated to notify the affected county attorney and transfer all relevant information, allowing the county attorney the opportunity to prosecute the offending party. MCA § 13-37-124(1). The county attorney has 30 days in which to initiate a civil or criminal action, at which time, if action is not taken the matter is waived back to the commissioner. *Id.* If the matter is waived back, the commissioner “may then initiate” legal action, but may exercise his discretion as to whether the matter is best solved by a civil action or the payment of a negotiated fine. MCA § 13-37-124(1), See also, *Bradshaw v. Bahr*, COPP-2018-CFP-008, at 4.

The minimum statutory penalty, even for a single late report, is \$500, but can be three times the amount of unreported contributions or expenditures. MCA § 13-37-128. In negotiating a fine, the commissioner may exercise his discretion and consider any and all mitigating factors. *Bradshaw*, at 4. If the matter is not resolved through the aforementioned negotiation, the commissioner retains statutory authority to bring a claim in district court against any person “who intentionally or negligently violates any requirement of campaign practice law.” *Id.* at 5.

The district court will consider the matter de novo, providing full due process to the alleged violator. The court, not the commissioner, determines the amount of liability when civil actions are filed under MCA § 13-37-128, and the court may take into account the seriousness of the violation(s) and the degree of a defendant’s culpability. MCA § 13-37-129. Because the court factors in culpability and

ultimately determines the amount, as commissioner I feel compelled to seek the maximum allowable penalty, which appropriately serves the contemplated purpose of the statute and defends the rights belonging to the public. The respondent, rather than the commissioner, should defend against the full measure of the law.

Enforcement applied to Judge Wilson

Judge Wilson's amended C-5 report now accurately reflects all loans made by Judge Wilson to his campaign. Here, COPP was able to communicate with Judge Wilson's campaign and these reporting errors were immediately corrected. However, the initial failure of Judge Wilson's campaign to properly report his ticket to the dinner and travel expenses must still be addressed.

As Judge Wilson initially stated in his response, the expense of the April 20, 2024, dinner was included in the appropriate C-5 finance report, but it was not properly identified as such. As stated above, expenditures must include enough detail that an interested party can ascertain what the expenditures were for. *Zephyr*, 18. This applies to expenditures by the campaign and (as is the case here) personal expenditures by the candidate. ARM 44.11.502(1). This error, as it was properly resolved, can be excused as de minimis.

Montana election law defines de minimis as "an action, contribution, or expenditure that is so small that it does not trigger registration, reporting, disclaimer, or disclosure obligations under Title 13, chapter 35 or 37, or warrant enforcement as a campaign practices violation under Title 13, chapter 37." MCA § 13-1-101(11). The applicable administrative rule provides several factors that a commissioner may consider in determining if a specific act is de minimis, including "the extent to which a particular campaign practice violation deprives the public of disclosure." ARM 44.11.603(d)

Here, the initial expense was reported and then properly amended to specify the purpose of this particular campaign expense, well in advance of the primary. Voters, the complainant, and other candidates had access to the information well before the election. The allegation that Judge Wilson failed to report the expense of his attendance at the Lincoln-Regan dinner is therefore dismissed as de minimis.

However, as explained above, there were five failures to report travel expenses on this single report. Judge Wilson's campaign entirely failed to report travel to Townsend, as well as travel to similar events totaling \$1,220.07. Further, this failure to report occurred on the last report filed before the primary election and therefore could not be remedied in a manner that provides full disclosure to voters before the election. This failure to report travel expenses cannot be dismissed.

Although Judge Wilson was very responsive to COPP staff, the primary factor considered when determining if prosecution is justified, is proximity to the election. As is the case here, the failure to report multiple transactions in the reporting period just prior to an election deprives voters of relevant and vital information. Therefore, prosecution of this violation is justified.

CONCLUSION

Based on the above discussion, I find sufficient evidence exists to determine the following:

- Any allegation that Judge Wilson received a contribution from a political party committee in violation of MCA § 13-35-231 is hereby dismissed in its entirety.
- While Judge Wilson failed to properly describe cash expenses related to the Lincoln-Regan Day dinner in Townsend required under MCA Sec. 13-37-229 this is de minimis in its nature and is hereby dismissed as de minimis.
- Judge Wilson violated MCA § 13-37-229 by failing to report campaign travel expenses. A civil action or penalty under MCA § 13-37-128 is justified and this matter will now be referred to the Flathead County attorney.

Having determined that prosecution is justified, this matter will now be referred to the Flathead County Attorney in accordance with the provisions of MCA § 13-37-124. The Flathead County Attorney's office is free to conduct their own investigation under MCA § 13-37-125, request additional material from COPP, or refer the matter back to this office for potential prosecution. Most matters are returned to COPP and are concluded with a negotiated settlement where mitigating factors are considered, and a civil penalty is determined pursuant to MCA § 13-37-

128. If a negotiated settlement is unsuccessful, the Commissioner will pursue the matter in Flathead County District Court.

Dated this 28th day of August, 2024,



Chris J. Gallus
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